MARY COLETE JOHN

v.

SOUTH EAST ASIA INSURANCE BHD

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
ABDUL MALIK ISHAK JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: J-02-1073-2004]
24 APRIL 2009

TORT: *Vicarious liability - Road accident - Appellant suffered injuries in the course of travelling to bride's house in insured's motor car - Whether appellant was being carried in insured vehicle as a mere passenger - Whether appellant being carried in vehicle by reason of or in pursuance of a contract of employment with the insured*

INSURANCE: *Motor insurance - Liability - Insurer's liability to satisfy judgment - Whether respondent liable under terms of insurance policy to satisfy judgment sum - Road Transport Act 1987, s. 96*

WORDS & PHRASES: *"By reason of or in pursuance of a contract of employment" - "Employment" - Section 11 of insurance coverage - Road Traffic Ordinance 1958, s. 75(1)(b)(ii)*

On 24 July 1985, the appellant, a beautician was engaged by Angel Helen Puspam Pereira ("Angel") to dress, make-up and beautify her brother's bride for a wedding in Kluang, Johore. Angel was to pay the appellant RM100 and provide her transport to enable the appellant to travel from her home in Seremban to Kluang, Johore and back. Angel owned a motor car bearing registration number BBU 8691 which was insured with the respondent. Angel's brother, Edwin Nobel Pereira ("Edwin") drove Angel's motor car with the appellant as a passenger to Kluang. Whilst travelling, the car skidded and overturned and the appellant was seriously injured becoming paralysed neck downwards. The appellant gave the requisite notice to the insurer respondent pursuant to s. 96(2) of the Road Transport Act 1987 and then brought an action against Angel as the registered owner of the car and against Edwin as the authorised driver at the Muar High Court. At the end of the trial, the Muar High Court found both Angel and Edwin liable and awarded her damages and costs. The respondent refused to pay the damages and costs awarded by the Muar High Court on the ground

A that the insurance policy taken by Angel did not cover passenger liability. The plaintiff then filed a recovery action against the respondent in the Muar High Court but this action was dismissed. The appellant then appealed to the Court of Appeal.

B **Held (dismissing the appeal with costs)**
Per Abu Samah Nordin JCA (Zaleha Zahari JCA concurring) delivering the majority judgment of the court:

(1) The appellant's engagement by Angel to make-up her brother's bride was a one-off engagement. The insured had no control over the appellant in her work as a beautician. She would in performing her work to dress, make up and beautify the bride be using her own skill and judgment. She provided her own equipment and for her services she would be paid RM100. All these factors led to the irresistible conclusion that she was engaged by the insured to perform those services as "a person in business on her own account". The appellant herself admitted that Angel was not her employer. Therefore, the appellant was travelling in the insured's car as an independent contractor and not by reason of or in pursuance of a contract of employment or service. (para 48)

(2) The learned High Court judge had not misdirected himself in law or in fact. He had duly considered the appellant's case and had extensively dealt with the law on these issues. In arriving at his decision the learned judge considered the distinction between a contract of service and a contract for services as the agreed issues for the decision of the court revolved on the question whether the appellant was travelling as a mere passenger or by reason of or in pursuance of a contract of employment. He came to a correct conclusion when he held that the respondent was not liable to satisfy the judgment of the High Court dated 19 May 1997. Accordingly, the appeal ought to be dismissed with costs. (paras 52 & 53)

H **Per Malik Ishak JCA (dissenting):**

(1) What Angel's brother did in transporting the appellant from Seremban to Kluang, Johore and back as agreed by Angel at a fee to enable the appellant to dress, make-up and beautify her brother's prospective bride for a wedding reception was not a prohibited act under s. 11 of the insurance coverage. It arose

out of and in the course of the appellant's employment and the accident occurred by reason of or in pursuance of a contract of employment albeit oral in nature between Angel and the appellant. There was in existence between Angel and the appellant an employer-employee relationship or a master-servant relationship. The flexibility of the doctrine of vicarious liability must be construed in favour of the appellant. Thus, the respondent was liable to pay the appellant under the terms of the insurance coverage taken by Angel in order to satisfy the judgment sought by the appellant in the recovery action. (para 100)

(2) The Muar High Court in the recovery action erred in fact and in law when it (i) held that at the material time the appellant was not covered by an insurance policy provided by the respondent and that the appellant was not carried in the insured vehicle "by reason of or in pursuance of a contract of employment" as provided for in the insurance coverage as well as s. 91(1)(bb) of the Road Transport Act 1987 and (ii) failed to appreciate the legal effect of the facts agreed upon between the appellant and the respondent that Angel engaged the appellant for a sum of RM100 to make-up the bride of Angel's brother; Angel would provide transport to the appellant to go to the bride's house and back to her home in Seremban; and the appellant suffered injuries in the course of travelling to the bride's house in the insured's vehicle. (paras 101 & 102)

(3) The words "by reason of or in pursuance of a contract of employment" in s. 11 of the insurance coverage do not require the appellant to prove that there was a strict employer-employee relationship with Angel. They must be read to mean that such a contract was the cause or one of the causes for the passenger to be carried. Here, the cause for the appellant to be carried in Angel's motor car was because of her engagement as a beautician by Angel - the insured owner of the motor car. The word "employment" in s. 11 of the insurance coverage must be given a wide meaning. It should not be restricted to an employment under a contract of service but extend to employment in "a dozen other ways." *Vandyke v. Fender And Another (Sun Insurance Office Ltd, Third Party)*. (paras 112, 113 & 114)

(4) The respondent as an insurer had a duty to satisfy a judgment against an insured like Angel. Once a third party had secured a judgment against a person insured by the policy, the insurer was under a statutory obligation to satisfy this judgment. (paras 116 & 120)

Bahasa Malaysia *Translation Of Headnotes*

Pada 24 Julai 1985 perayu, seorang pakar kecantikan telah diupah oleh satu Angel Helen Puspam Pereira ('Angel') untuk memakaikan, menyolek dan mencantikkan pengantin perempuan yang akan mengahwini abangnya untuk satu majlis perkahwinan di Kluang, Johore. Angel sepatutnya membayar RM100 dan membekalkan pengangkutan supaya perayu boleh ulang alik dari rumahnya di Seremban ke Kluang Johore. Angel memiliki sebuah kereta yang mempunyai nombor berdaftar BBU 8691 yang diinsuranskan dengan responden. Abang Angel Edwin Nobel Pereira ('Edwin') memandu kereta Angel dengan perayu sebagai penumpang ke Kluang. Semasa dalam perjalanan, kereta telah tergelincir dan terbalik dan perayu mengalami kecederaan yang serius dan beliau lumpuh dari leher. Perayu telah memberi notis yang diperlukan kepada penanggung insurans responden di bawah s. 96(2) Akta Pengangkutan Jalan 1987 dan membawa tindakan guaman terhadap Angel sebagai pemilik berdaftar kenderaan dan terhadap Edwin sebagai pemandu kenderaan tersebut di Mahkamah Tinggi Muar. Di akhir perbicaraan, Mahkamah Tinggi Muar mendapati bahawa Angel dan Edwin bertanggungjawab dan mengawardkan ganti rugi dan kos kepada perayu. Responden enggan membayar gantirugi dan kos yang telah diperintahkan oleh Mahkamah Tinggi Muar atas alasan bahawa polisi insurans yang diambil oleh Angel tidak melindungi liabiliti penumpang. Plaintif kemudiannya memfailkan tuntutan recovery terhadap responden di Mahkamah Tinggi Muar tetapi tuntutan itu ditolak. Perayu seterusnya merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan dengan kos)

Oleh Abu Samah Nordin HMR (Zaleha Zahari HMR menyetujui) menyampaikan penghakiman majoriti mahkamah:

(1) Perlantikan perayu oleh Angel untuk menyolek bakal pengantin perempuan abangnya adalah perlantikan sementara sahaja. Pihak yang dilindungi tidak mempunyai kawalan ke atas perayu dalam pekerjaannya sebagai pakar kecantikan. Perayu dalam menjalankan tugasnya untuk pemakaian baju, menyolek dan

mencantikkan pengantin perempuan menggunakan kepakarannya dan pengetahuannya sendiri. Beliau membekalkan alat-alat untuk perkhidmatannya sendiri dan dibayar sebanyak RM100. Faktor-faktor ini menunjukkan satu-satunya konklusi bahawa beliau dilantik oleh pihak yang diinsuranskan untuk menjalankan perkhidmatan sebagai 'seseorang yang berniaga sendiri'. Perayu sendiri mengaku bahawa Angel bukan majikannya. Oleh itu, perayu menaiki kereta pihak yang dilindungi sebagai kontraktor bebas dan bukan atas sebab-sebab atau berdasarkan kepada suatu kontrak pekerjaan atau perkhidmatan.

(2) Hakim Mahkamah Tinggi tidak tersalah arah dari segi undang-undang dan fakta. Beliau telah mempertimbangkan kes perayu dan telah mengambil kira dengan mendalam undang-undang atas isu-isu ini. Dalam mencapai keputusannya hakim bicara telah mempertimbangkan perbezaan di antara 'contract of service' dan 'contract for services' kerana isu yang dipersetujui untuk keputusan mahkamah berkisar di sekitar persoalan sama ada perayu menaiki kereta itu sebagai penumpang atau atas sebab-sebab atau berdasarkan kepada suatu kontrak pekerjaan. Beliau mencapai konklusi yang betul apabila beliau memutuskan bahawa responden tidak liable untuk memuaskan penghakiman Mahkamah Tinggi bertarikh 18 Mei 1997. Oleh itu, rayuan sepatutnya ditolak dengan kos.

Oleh Malik Ishak HMR (menentang):

(1) Apa yang dilakukan oleh abang Angel dalam menumpangkan perayu dari Seremban ke Kluang Johore seperti yang dipersetujui oleh Angel dengan upahan tertentu supaya perayu boleh memakaikan, menyolek dan mencantikkan bakal pengantin perempuan abang Angel untuk majlis perkahwinan bukanlah tindakan dilarang di bawah s. 11 perlindungan insurans. Ia berlaku dalam masa pekerjaan perayu dan kemalangan berlaku atas sebab-sebab atau berdasarkan kepada suatu kontrak pekerjaan walaupun ia secara lisan di antara Angel dan perayu. Terdapat kewujudan antara Angel dan perayu, satu perhubungan majikan dan pekerja ataupun majikan dan pengkhidmat. Fleksibiliti doktrin tanggungan vikarius mesti ditafsirkan supaya memanfaatkan perayu. Oleh itu, responden sememangnya liable membayar perayu di bawah terma-terma perlindungan insurans yang diambil oleh Angel untuk memuaskan penghakiman yang dituntut oleh perayu di dalam tuntutan mendapatkan balik.

(2) Mahkamah Tinggi Muar di dalam tuntutan recovery salah dari segi fakta dan undang-undang apabila ia (i) memutuskan bahawa pada masa material perayu tidak dilindungi oleh polisi insurans yang diberi oleh responden dan bahawa perayu tidak menumpang kereta yang diinsuranskan 'atas sebab-sebab atau berdasarkan kepada suatu kontrak pekerjaan' yang diperuntukkan di dalam perlindungan insurans serta s. 91(1)(bb) Akta Pengangkutan Jalan 1987 dan (ii) gagal untuk memahami kesan undang-undang fakta-fakta yang dipersetujui di antara perayu dan responden; bahawa Angel melantik perayu dengan upahan RM100 untuk menyolek pengantin perempuan abang Angel; Angel akan menyediakan pengangkutan untuk perayu untuk ulang alik dari rumah pengantin ke rumahnya di Seremban; dan perayu mengalami kecederaan dalam masa perjalanan yang diambil beliau ke rumah pengantin di dalam kenderaan pihak yang diinsuranskan.

(3) Perkataan-perkataan 'atas sebab-sebab atau berdasarkan kepada suatu kontrak pekerjaan' di dalam s. 11 perlindungan insurans tidak memerlukan perayu membuktikan bahawa terdapat perhubungan majikan pekerja dengan Angel. Ia perlu dibaca dengan bermaksud bahawa kontrak seperti itu adalah sebab atau antara sebab-sebab penumpang itu perlu dibawa. Di sini, sebab mengapa perayu perlu dibawa di dalam kenderaan Angel adalah kerana perlantikannya sebagai pakar kecantikan oleh Angel - pemilik kenderaan yang diinsuranskan. Perkataan 'pekerjaan' di dalam s. 11 perlindungan insurans mestilah diberi maksud yang luas. Ia tidak patut dihadkan kepada pekerjaan di bawah kontrak perkhidmatan tetapi kepada pekerjaan dalam 'berbagai cara-cara yang lain'. *Vandyke v. Fender And Another (Sun Insurance Office Ltd, Third Party)*.

(4) Responden sebagai penanggung insurans mempunyai tanggungjawab untuk memuaskan penghakiman terhadap pihak yang diinsuranskan seperti Angel. Sekali pihak ketiga berjaya mendapatkan penghakiman terhadap pihak yang diinsuranskan oleh polisi, penanggung insurans adalah di bawah tanggungjawab statutorinya untuk memuaskan penghakiman.

Case(s) referred to:

Airfix Footwear Ltd v. Cope [1978] ICR 1210 ***(refd)***

Akberdin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia [2002] 4 CLJ 689 CA ***(refd)***

Alex Kay Pty. Limited v. General Motors Acceptance Corporation and Hartford Fire Insurance Company [1963] VR 458 ***(refd)***

Argent v. Minister of Social Security [1968] 1 WLR 1749 ***(refd)***
Bank voor Handel en Scheepvaart NV v. Slatford [1953] 1 QB 248 ***(refd)***
Bata Shoe Company (Malaya) v. Employee Provident Fund Board [1966] 1 LNS 18 HC ***(refd)***
Beloff v. Pressdram [1973] 1 All ER 241 ***(refd)***
Burton And Another v. Road Transport & General Insurance Company, Ltd [1939] Lloyd's List Law Reports 253 ***(refd)***
Cassidy v. Ministry of Health [1951] 2 KB 343 ***(refd)***
Central Lorry Service Co Sdn Bhd v. The American Insurance Co [1980] 1 LNS 175 HC ***(foll)***
Ceylon Motor Insurance Association, Ltd v. Thambugala [1953] 2 All ER 870 ***(foll)***
Chan Kum Fook & Ors v. Welfare Insurance Co Ltd [1975] 1 LNS 6 HC ***(foll)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***
Hamilton v. Farmers' Ltd [1953] 3 DLR 382 (NSSC) ***(refd)***
Harrison v. Michelin Tyre Co Ltd [1985] ICR 695 ***(refd)***
Hong Liang Ting & Ors v. China Insurance Co Ltd [1984] 1 LNS 13 HC ***(refd)***
Houghton v. Trafalgar Insurance Co Ld [1954] 1 QB 247 ***(refd)***
Izzard v. Universal Insurance Company Limited [1937] AC 773 ***(refd)***
Jefferson And Others v. Derbyshire Farmers, Limited [1921] 2 KB 281 ***(refd)***
Kooragang Investments Pty Ltd v. Richardson & Wrench Ltd [1981] 3 All ER 65 ***(refd)***
Lane v. Shire Roofing Co (Oxford) Ltd [1995] IRLR 493 ***(refd)***
Lee Ting Sang v. Chong Chi-Keung & Anor [1990] 2 AC 376 ***(refd)***
Lee Ting Sang v. Chung Chi-Keung And Another [1990] ICR 409 ***(refd)***
Malaysian National Insurance Sdn Bhd v. Lim Tiok [1997] 2 CLJ 351 SC ***(refd)***
Manap Mat v. General Accident Fire & Life Assurance Corporation Ltd [1971] 1 LNS 76 CA ***(refd)***
Market Investigations Ltd v. Minister of Social Security [1969] 2 QB 173 ***(foll)***
McDermid v. Nash Dredging & Reclamation Co Ltd [1987] 1 AC 906 ***(refd)***
McMeechan v. Secretary of State for Employment [1995] ICR 444 ***(refd)***
Medical Defence Union Ltd v. Department of Trade [1980] 1 Ch 82 ***(refd)***
Mersey Docks And Harbour Board v. Coggins & Griffiths (Liverpool) Ltd And McFarlane [1947] AC 1 ***(refd)***
Montreal v. Montreal Locomotive Works Ltd [1947] 1 DLR 161 ***(foll)***
Morris v. Ford Motor Co Ltd, Cameron Industrial Services Ltd (Third Party), Roberts (Fourth Party) [1973] 1 QB 792 ***(foll)***
Narich Pty Ltd v. Payroll Tax Commissioner [1984] ICR 286 PC ***(refd)***
Nethermere (St Neots) Ltd v. Gardiner And Another [1984] ICR 612 ***(refd)***
O'Kelly And Others v. Trusthouse Forte PLC [1983] ICR 728 ***(refd)***

Pacific & Orient Insurance Co Sdn Bhd v. Lee Yin Siong & Anor [1983] 1 CLJ 91; [1983] CLJ (Rep) 690 HC ***(refd)***
Performing Right Society, Limited v. Mitchell and Booker (Palais De Danse), Limited [1924] 1 KB 762 ***(refd)***
Petterson v. Royal Oak Hotel, Limited [1948] NZLR 136 ***(refd)***
QBE Insurance Ltd v. Dr K Thuraisingam [1982] CLJ 260; [1982] CLJ (Rep) 705 HC ***(refd)***
Ready-mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance [1968] 2 QB 497 ***(refd)***
Richards v. Cox [1942] 2 All ER 624 ***(dist)***
Rose v. Plenty And Another [1976] 1 WLR 141 ***(refd)***
Simmons v. Health Laundry Company [1910] I KB 543 ***(refd)***
Staton v. National Coal Board [1957] 1 WLR 893 ***(refd)***
Stevenson, Jordan & Harrison Ltd v. Mac Donald & Evans [1952] 1 TLR 101 ***(refd)***
Tan Keng Hong & Anor v. Fatimah Abdullah & Ors [1974] 1 LNS 166 FC ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plentitude Holdings Sdn Bhd [1993] 2 CLJ 146 SC ***(refd)***
The People's Insurance Company (Malaysia) Bhd v. Ting Tiew Kiong [2007] 5 CLJ 225 CA ***(refd)***
The People's Insurance Co (M) Sdn Bhd v. Syarikat Kenderaan Melayu Kelantan Bhd (No 2) [2001] 1 CLJ 510 HC ***(refd)***
Union Insurance Malaysia Sdn Bhd v. Chan You Young [1995] 4 CLJ 92 HC ***(refd)***
Union Insurance Malaysia Sdn Bhd v. Chan You Young [1999] 3 CLJ 517 CA ***(dist)***
United Wholesale Grocers Ltd v. Sher [1993] SLT 284 ***(refd)***
Vandyke v. Fender [1970] 2 All ER 343 ***(refd)***
Vandyke v. Fender and Another (Sun Insurance Office Ltd, third party) [1970] 2 All ER 335 CA ***(refd)***
Whittaker v. Minister of Pensions and National Insurance [1967] IQ B ***(refd)***
Wong Choo Yong v. Safety Insurance Co Ltd [1970] 1 LNS 171 HC ***(foll)***
Yewens v. Noakes [1880-81] 6 QBD 530 ***(refd)***
Young & Woods Ltd v. West [1980] IRLR 201 ***(refd)***

Legislation referred to:

Road Transport Act 1987, ss. 91(1)(bb), 96(1), (2)(b)
Road Traffic Ordinance 1958, ss. 75(1)(i), (ii), (b)(ii), 80
Third Parties (Rights against Insurers) Act 1930, s. 1

Merchant Shipping Act 1894 [UK], s. 503
Merchant Shipping (Liability of Shipowners and Others) Act 1958 [UK], s. 3(2)(a)
Road Traffic Act 1960 [UK], s. 203(4)

Other source(s) referred to:

Burton & Anor v. Road Transport & General Insurance Lloyd's List Law Reports vol 63-253, p 257
Chitty on Contracts, vol 11, 29th edn, p 937
John G Fleming, *The Law of Torts*, 1957, pp 354-355
Munkman on Employer's Liability, 12th edn, pp 35-38
Selwyn's Law of Employment. 15th edn, p 43
Sir Frederick Pollock, *The Law of Torts*, 13th edn, 1929 publication, pp 82
The Black's Law Dictionary, 6th edn, pp 74-75

For the plaintiff/appellant - N Jegatheson (Ng Lee Kian with him); M/s Ramasamy & Co
For the defendant/respondent - Prakash Menon (V Nadaraja with him); M/s Isharidah Ho Chong & Menon

[Appeal from High Court, Muar; Civil Suit No: 23-62-1999]

Reported by Susheila Sreedharan

JUDGMENT

Abu Samah Nordin JCA:

[1] This is an appeal by the appellant against the decision of the High Court in Muar dismissing her action against the respondent to enforce a judgment under s. 96 of the Road Transport Act 1987 ("the Act") which she had obtained in the Muar High Court Civil Suit No. 23(25)-15 of 1990 against Angel Helen Puspam d/o Pereira who was the owner of vehicle No. BBU 8691 ('the insured') and Edwin Nobel Preira who was the authorised driver of the said vehicle ('authorised driver')

[2] The respondent is the insurer of the said vehicle. On 24 July 1985 the appellant was travelling as a passenger in the said vehicle when it skidded and overturned causing her to suffer serious injuries resulting in her being paralysed from neck downwards.

[3] On 19 May 1997 the High Court in Muar awarded her general and special damages and costs totalling RM596,030.35 against both the insured and the authorised driver. Their appeal to the Court of Appeal had been dismissed with costs. The respondent, being the insurer of the said vehicle, refused to satisfy the judgment sum. It is this refusal which triggered the appellant to commence her action against the respondent under s. 96 of the Act.

[4] The agreed facts before the High Court are as follows:

4.1 The plaintiff was a beautician and part of her job was to make-up and beautify marriage brides. Sometime in July 1985 one Angel Helen Puspam Pereira (Angel), engaged the plaintiff to dress, make-up and beautify the bride for a wedding taking place in a Church Kluang Town, Johore. The agreed term of the engagement was that the Plaintiff (would) be paid RM100.00 by Angel, and that transport (would) also be provided by Angel to enable her to travel from her home in Seremban to Kluang, Johor and back.

4.2 On 24-7-1985 the Plaintiff got into car No: BBU 8691 belonging to Angel, driven by her brother Edwin Nobel Pereira and was on her way from Seremban to Kluang to attend to the bride as employed by Angel. While on the way to the bride's home in Ladang Treh Utara, Kluang, the car skidded and overturned and the Plaintiff was seriously injured suffering neck-down paralysis.

4.3 The Plaintiff at all material times was travelling as a passenger in motorcar No. BBU 8691.

4.4 The car No. BBU 8691 was at all material time insured by the Defendant South East Asia Insurance Berhad as per Insurance Policy found in pages 2 - 14 of IDP.

4.5 The Plaintiff after giving requisite notice dated 19-10-1990 to the Defendant South East Asia Insurance Berhad under Section 96(2) of Road Transport Act 1987 brought an action against Angel Helen Puspam Pereira as registered owner of the car and Edwin Nobel Pereira as driver *vide* Muar High Civil Suit No. 23(25)-15 of 1990. South East Asia Insurance Berhad was in control of conducting that trial through their Solicitors Messrs L. Pereira & Associates on behalf of Angel Helen Puspam and Edwin Noble Pereira. After a full hearing the Court held Angel Helen Puspam and Edwin Noble Pereira liable and made an award as in Court Order dated 19-5-1997 IDP pages 49 - 52 and that the findings and the award as in pages 55 - 62 of IDP were confirmed by the Court of Appeal on 12-4-1999 (IDP pages 53 - 54).

4.6 The Defendant South East Asia Insurance Berhad refused to pay the damages and costs awarded in Civil Suit No: 23(25)-15 of 1990 on grounds that the Insurance Policy concerned does not cover passenger liability.

[5] The agreed issues for the decision of the High Court are as follows:

5.1 At the material time was the Plaintiff being carried in the insured's vehicle as a mere passenger or was she travelling pursuant to the agreed engagement with the insured to make up the bride for the agreed sum of RM100.00.

5.2 If it is held that the Plaintiff was not being carried as a mere passenger then, the issues are:

(a) was the Plaintiff being carried by reason of or in pursuance of a contract of employment with the insured;

(b) and if so are the Defendant liable under the terms of the said insurance policy to satisfy the judgment sum.

[6] The relevant terms and conditions of the policy of insurance which are in dispute between the parties are contained in s. 11, which read as follows:

Section II - Liability to Third Parties

1. The Company will subject to the Limits of Liability indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of

(a) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the Insured, and excluding liability to any person being a member of the Insured household who is a passenger in the Motor Vehicle unless such person is being carried by reason of or in pursuance of a contract of employment.

(b) ...

2. In terms of and subject to the limitations of and for the purposes of this Section the Company will indemnify any authorised driver who is driving the Motor Vehicle provided that such Authorised Driver

(i) shall as though he were the Insured observe and fulfil and be subject to the terms of the Policy insofar as they can apply

(ii) is not entitled to indemnity under any other policy.

[7] The said policy was issued pursuant to and in compliance with s. 75 of the Road Traffic Ordinance 1958 ("the Ordinance"). It also covers the authorised driver.

[8] Section 75 of the Ordinance states:

> (1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which:
>
> (a) is issued by a person who is an authorised insurer within the meaning of this Part of this Ordinance; and
>
> (b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:
>
> Provided that such policy shall not be required to cover:
>
> (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
>
> (ii) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried on or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or
>
> (iii) any contractual liability.

It is important to note that s. 75(1)(i) uses the phrase "in the course of his employment" while s. 75(1)(ii) uses the phrase "a contract of employment". The latter phrase is reflected in s. 11 para. 1(a) of the insurance policy. What we are concerned here is whether the appellant suffered the injuries while travelling in the insured car, "by reason of or in pursuance of a contract of employment".

[9] The Ordinance has since been repealed and replaced by the Road Transport Act 1987 which came into force on 1 January 1988. That was the reason why the appellant sought to enforce the

judgment under s. 96 of the Act, which was previously s. 80 of the Ordinance. Section 75(1)(ii) of the repealed Ordinance is in *pari materia* with s. 91(1)(bb) of the present Act.

[10] Before the learned judge, it was contended by the appellant that by virtue of s. 75(1)(ii) of the Ordinance the insurers were liable under their policy when passengers suffered bodily injury whilst being carried in the vehicle by reason of or in pursuance of a contract of employment. Thus, when the appellant suffered bodily injuries whilst travelling in the insured vehicle, the respondent, being the insurer, must be held liable to satisfy the judgment pursuant to s. 96 of the Act. The respondent however contended that it was not liable to the appellant under the terms and conditions of the insurance policy. It was submitted that the appellant was not travelling in the said vehicle by reason of or in pursuance of a contract of employment between the appellant and the insured.

[11] The learned judge agreed with the respondent. His lordship found, on the facts of the case, that there was no employer-employee relationship between appellant and the insured. That being so, the respondent was not liable to satisfy the judgment under s. 96 of the Act. The appellant was plainly an independent contractor and that she was not carried in the said car by reason of or in pursuance of a contract of employment. The contract between the appellant and the insured was a contract for services and not a contract of service. As a result, the learned judge dismissed the appellant's action with costs. The appellant, being dissatisfied appealed against the said decision.

The Appellant's Contention

[12] Before us, learned counsel for the appellant contended firstly, that all that the appellant has to prove was that at the material time when the car was driven by the authorised driver she was a passenger by reason of or in pursuance of a contract of employment. He relied on s. 75(1)(ii) of the Ordinance. What that section means, in so far as it is relevant to our case is that, the policy is not required to cover liability in respect of bodily injury to persons being carried on the vehicle at the time of the occurrence of the event out of which the claims arise except in the case in which the passengers are carried in the vehicle ".. by reason of or in pursuance of a contract of employment". In support thereof, the learned counsel cited *Manap Mat v. General Accident Fire & Life*

Assurance Corporation Ltd [1971] 1 LNS 76; C*han Kum Fook & Ors v. Welfare Insurance Co Ltd* [1975] 1 LNS 6; [1975] 2 MLJ 184, at p. 185; *Richards v. Cox* [1942] 2 All ER 624.

[13] Secondly, it was contended that the words "by reason of or in pursuance of a contract of employment" in s. 75(1)(ii) of the Ordinance do not connote nor require the appellant to prove that there was a strict employer-employee relationship with the insured owner of the vehicle. These words embrace a wider category of employees and not confined to a strict employer-employee relationship. The test being whether the appellant was then being carried on the insured owner's vehicle 'for sufficient practical or business reasons'. See: *Vandyke v. Fender* [1970] 2 All ER at p. 343; *Izzard v. Universal Insurance Company Limited* [1937] AC 773 at pp. 781 & 782; *Union Insurance Malaysia Sdn Bhd v. Chan You Young* [1995] 4 CLJ 92; [1996] 2 MLJ 118 at p. 134.

[14] In *Izzard v. Universal Insurance Company Limited* the respondent company issued a policy of insurance to Willian Druce on a commercial vehicle against various risks, including liability to third parties. The appellant was a widow whose husband Izzard, had been killed in an accident due to the negligence of a servant of Druce. At the time of the accident Izzard was employed by a third party, namely, Industrial Builders Ld. ("IBL") which was engaged in building constructions at Conventry. IBL had earlier entered into a verbal contract with Druce, a haulage contractor, to do haulage work for the former between Didcot and Conventry. It was also agreed that Druce would put a lorry at IBL's disposal every weekend for the conveyance of workmen from Conventry to Didcot and *vice versa*. Izzard met his death while being carried back to Didcot on one Saturday in the insured vehicle.

[15] She recovered damages on that ground against Druce. Druce having become bankrupt, the appellant sued the respondent on the ground that Druce was entitled under the policy to be indemnified by it in respect of third party liability and that the appellant had now a direct claim against the respondent vested in her in virtue of s. 1 of the Third Parties (Rights against Insurers) Act 1930. The respondent disputed the claim, contending that under the policy the particular liability was not covered.

[16] The terms of the policy provided *inter alia*, that the insurance company would indemnify Druce against liability in respect of "death of or bodily injury to any person caused by or

arising out of the use of the vehicle ... Provided always that the company shall not be liable in respect of ... (b) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment; (c) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon ... such vehicle".

[17] The Court of Appeal (Greer LJ dissenting) reversed the decision by Mac Kinnon J and held that the expression "contract of employment" in cl. (c) above was limited to a contract of employment between a passenger and the insured and that the respondent was not liable to indemnify the insured against liability for the death of a passenger in the vehicle by reason of or in pursuance of a contract of employment with some other person other than the insured. The appellant appealed to the House of Lords, contending that the words 'under a contract of employment' should be given their plain meaning as denoting a person who was on the motor vehicle by reason of any contract of employment, there being no reason for narrowing the words into a contract of employment with the insured person.

[18] The House of Lords allowed the appeal and held that the language of cl. (c) was not to be construed as applying only to the death or injury to a person in the employment of Druce while being carried on the vehicle; that it applied to any person being carried in pursuance of a contract of employment with another employer. Lord Wright at p. 782 dismissed the respondents' contention as follows:

> I cannot accept the respondents contention that "contract of employment" should be construed in the Act as subject to the implied limitation "with the person insured by the policy". Such a departure from the clear language used cannot, I think, be justified. I think the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons. But there is no sufficient ground for holding that this criterion should be limited to employees of the insurers. Such employees, if injured or killed, would ... fall under exception (1).

[19] In *Vandyke v. Fender and Another*, the plaintiff was severely injured in a accident while travelling in a car provided by his company ('second defendant') and driven by another employee ('first defendant'). As an inducement to the plaintiff and the first

defendant to take up employment at the second defendant's foundry, a car belonging to the second defendant was lent to the first defendant and weekly payments were made to him for petrol on the understanding that if he used it to go to and from work, he would bring the plaintiff and two other employees of the second defendant with him. At the weekend the first defendant kept the car at his home and used it as he wished. Another car owned by the company's secretary was later substituted but the plaintiff and the first defendant were led to believe that this also belonged to the company. While driving the plaintiff to work in the company secretary's car, the first defendant negligently collided with another car and the plaintiff was severely injured. The plaintiff sued the first and second defendant for damages on the ground that the accident was caused by the negligence of the first defendant while driving as the servant or agent of the second defendant. The second defendant claimed indemnity or contribution from the first defendant and an indemnity from the third party under the employers liability insurance policy. The High Court held that both defendants were liable.

[20] The Court of Appeal affirmed the decision of the High Court against both defendants on liability. One of the issues raised by the second defendant in the appeal turned on the construction of the words "by reason of or in pursuance of a contract of employment" in s. 203(4) of the Road Traffic Act 1960. Counsel for the second defendant contended that the second defendant was not liable for the first defendant's negligence unless at the time of the accident the first defendant was driving in the course of his employment as part of his duties under the contract under which he was employed. Lord Denning held that the plaintiff was not injured in the course of his employment as he was not under any obligation to ride in the car but held the second defendant liable by virtue of the words, "by reason of or in pursuance of a contract of employment" in s. 203(4) of the Road Traffic Act 1960. This is what Lord Denning at p. 34 said:

> Those words are much wider than the words 'in the course of his employment'. I think that passengers are carried in a vehicle 'by reason of a contract of employment' whenever such a contract is the cause or one of the causes, of their being carried. If they are carried in it habitually or as a matter or practice, the vehicle must be covered in respect of them, see *Connell v. Motor Insurers' Bureau* [1969] 3 All ER 572. This car undoubtedly falls within this description. It was regularly used to carry these men to and from their work.

Hence, the learned counsel for the appellant submitted that it was by virtue of the appellant's engagement as a beautician that she was being carried in the insured's vehicle.

[21] Thirdly, it was contended that the word 'employment' in s. 75(1)(ii) of the Ordinance must be given its ordinary meaning in English, meaning employment both under a contract of service and employment in a dozen other ways and it is not necessary to restrict the meaning of the word 'employment' to employment under a contract of service. See *Burton & Anor v. Road Transport & General Insurance Lloyd's List Law* Reports vol. 63-253 at p. 257. As such the learned judge erred in requiring the appellant to prove a strict employer-employee relationship with the insured for her to seek relief under this sub-section. Further, after having found that the appellant was at the material time employed by the insured in the sense of engaged the learned judge erred when he strained this finding to nevertheless hold that there was no employer-employee relationship in the strict sense when s. 75(1)(ii) did not require such a finding.

[22] Fourthly, it was contended that for the appellant to seek cover under this s. 75(1)(ii) of the Act there was no need to make a distinction between a contract of service and a contract for services. Thus the learned judge erred in making this distinction for a claim under s. 75(1)(ii) of the Act.

[23] Finally, the appellant contended that the interpretation of s. 75(1)(ii) of the Act required purposive approach as it has been enacted to protect the interest of the public and innocent third parties. See *Malaysian National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351; *The People's Insurance Co v. Syarikat Kenderaan Melayu Kelantan* Bhd (No 2) [2001] 1 CLJ 510; *Akberdin Hj Abdul Kader v Majlis Peguam Malaysia* [2002] 4 CLJ 689; *Union Insurance Malaysia Sdn Bhd v. Chan You Young* [1995] 4 CLJ 92; *The People's Insurance Company (Malaysia) Bhd v. Ting Tiew Kiong* [2007] 5 CLJ 225. The learned judge therefore erred in not interpreting this legislation in the above spirit.

The Respondent's Contention

[24] Learned counsel for the respondent submitted that the policy was not required to cover: (i) liability to a mere passenger; (ii) liability to an insured's employee for injuries sustained arising out of and in the course of his employment; (iii) except where passengers were carried by reasons of or in pursuance of a contract

of employment. In this case, the appellant was travelling as a mere passenger and not by reason of or in pursuance of a contract of employment and therefore the policy did not cover the liability to the appellant's passenger. The appellant herself admitted in her testimony that she was self employed and that the insured was not her employer. The insured, who gave evidence for the appellant in the High Court confirmed, in cross-examination that the appellant was not her employee. The learned counsel for the respondent referred to *Tan Keng Hong & Anor v. Fatimah Abdullah & Ors* [1974] 1 LNS 166; [1974] 1 MLJ 156 and *Hong Liang Ting & Ors v. China Insurance Co Ltd* [1984] 1 LNS 13 in support of his contention. The only circumstances under which the respondent would be liable to the appellant is, if she comes within the exception under s. 11(1) of the policy, namely, if she was being carried by reason of or in pursuance of a contract of employment.

[25] In *Tan Keng Hong & Anor v. Fatimah Abdullah & Ors*, the issue was whether the insurers were liable to indemnify the appellants, that is, the driver and the owner of a lorry (second defendant) against whom judgment for damages in negligence had been given. The lorry was insured by the insurers under a third-party policy which excepted liability for death caused to any person carried on the vehicle (other than a passenger carried by reason of or in pursuance of a contract of employment). The deceased met his death when the lorry in which he had obtained a free lift to Seremban, overturned. The High Court held that the insurers were not liable and the appellants appealed. The Federal Court dismissed the appeal on the ground that there was no evidence that it was a term of the contract of employment between the deceased and his employer that he shall be carried in the appellant's lorry. It was a fact that the deceased was merely getting a free lift and that he was not on official duty.

[26] In that case, s. 11 of the insurance policy contains, amongst others, the following exceptions:

> The company shall not be liable in respect of:
>
> (ii) death of ... any person in the employment of the insured arising out of and in the course of such employment;
>
> (iii) death of ... any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon ... the motor vehicle at the time of the occurrence of the event out of which any claim arises.

[27] The Federal Court, at p. 156, explained the aforesaid exceptions as follows: A

> In this case, the contract of employment cannot mean contract of employment with the second defendant, because exception (ii) clearly excludes the insurers from liability in respect of death of any person in the employment of the second defendant arising out of and in the course of such employment. So it is clear that the words in italics can only mean that the insurers will be liable to indemnify the defendants in respect of the death of a passenger not employed by the second defendant and carried by reason of or in pursuance of a contract of employment. B C
>
> On the authority of *Baker v. Provident Accident* and *White Cross Insurance Co. Ltd.*,(2) a decision of Cassels J., we hold that a person is carried "by reason of" a contract of employment if, for instance, he is directed by his employer to travel in a vehicle, and the employer is able to give that direction because of the relationship of employer and employee; and that a person is carried "in pursuance of" a contract of employment if it is a term of the contract that he shall be carried. D

[28] The respondent submitted that the appellant was travelling in the car as an independent contractor simply to beautify the bride for a fee and cannot by any stretch of imagination be considered as an employee of the insured. The learned counsel for the respondent referred to *The Black's Law Dictionary* 6th edn, at pp. 74-75 which defined the meaning of an independent contractor as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent". E F

[29] Further the insured could not be said to be an 'employee' of the plaintiff on the facts of the case. The word 'employer' is defined in the Employment Act 1955 as 'any person who has entered into a contract of service to employ any other person as an employee and include the agent ..' while the word 'employee' is defined as 'any person, irrespective of his occupation who has entered into a contract of service with an employer'. *Munkman on Employer's Liability*, 12th edn, at pp. 35-38 defines the word 'an employee' as someone who works under a contract of service in contrast to an independent contractor who works under a contract for service. Here, the appellant candidly admitted that she was self employed and that the insured was not her employer. G H I

A **The Issues**

[30] The first issue is whether the appellant was being carried in the insured vehicle as a mere passenger. The answer to this is pretty obvious. On the facts as agreed between the parties the
B appellant was certainly not a mere passenger. She was engaged by the insured to dress, make-up and beautify the bride for a wedding and that transport would be provided by the insured for her to travel from Seremban to Kluang, Johor. In consideration thereof she would be paid RM100.

C **[31]** The next issues for the determination of the court are these:

(i) Was the appellant being carried in the vehicle by reason of or in pursuance of a contract of employment with the insured; and

D (ii) If so was the respondent liable under the terms of the insurance policy to satisfy the judgment sum.

[32] The appellant's stand is that she was travelling in the vehicle by reason of or in pursuance of a contract of employment. In other words, there existed a contract of service between her and
E the insured *albeit* it was not in the strict sense of employer-employee relationship. She was, to echo the words of Lord Wright in *Izzard v. Universal Insurance Co Ltd*, travelling in the vehicle "for sufficient practical or business reasons", namely to dress, make-up and beautify the bride for a wedding and further it was agreed that
F the insured would provide the vehicle. The word "employment" itself, as it was held in *Burton and Another v. Road Transport & General Insurance Company Ltd*, in its ordinary meaning in English mean employment 'both under a contract of service and
G employment in a dozen other ways'. It cannot be restricted to mean employment under a contract of service alone.

[33] The respondent's position is that the appellant was travelling in the vehicle as an independent contractor; that there was no contract of service between her and the insured and that there was
H no employer-employee relationship that existed between them. The appellant had testified in court that the insured was not her employer. The insured, who gave evidence for the appellant, confirmed that she was not her employer.

I **[34]** So, what then are the indicia or factors that the court take into account to determine whether the appellant was travelling in the vehicle by reason of or in pursuance of a contract of employment or as an independent contractor? It has been said that

the distinction between those who are employed and those who are self-employed is that the employed person works under a contract of service, whereas the self employed works under a contract for services. It is easy to state this distinction but in practice it has proved difficult to draw it, and over the years the courts, have developed a number of tests designed to produce a given results. Fundamentally, for the relationship of employer-employee to exist there must be a contract of employment, either express or implied: see Selwyn's *Law of Employment* 15th edn at p. 43.

[35] Decided cases merely indicate a number of indicia or factors which are relevant to a finding that a particular contract is one of employment or a contract of service. The presence or absence of anyone such factor is inconclusive since the decision depends on the combined effects of all the relevant factors, when those pointing towards 'employment' are weighed up with those pointing against: see *Chitty on Contracts*, vol. 11, 29th edn at p. 937. It is possible to be employed as self employed at the same time in different jobs as well as work for many different contractors simultaneously. Lord Denning, in *Stevenson, Jordan & Harrisons Ltd v. Mac Donald* [1952] 1 The Time LR 101 prophetically summed it up as follows: "it is often easy to recognize a contract of service when you see it but difficult to say where is the difference lies. A ship's master, a chauffeur and a reporter and the staff of a newspaper are all employed under a contract of service, but a ship's pilot, a taximan, and a newspaper contributor are employed under a contract for services".

[36] A common criterion to determine whether or not the relationship of employer-employee exists is to find out the extent to which a person is under a control of the other party with regard to the manner in which the work is done: *Narich Pty Ltd v. Payroll Tax Commissioner* [1984] ICR 286 PC. Thus if the employer could tell the employee not only what to do, but how to do it, then a contract of service existed: *Yewens v. Noakes* [1880] 6 QBD 530. It is clear that the greater the degree of control which is exercisable by the employer, the more likely it will be that the contract is one of service: *Whittaker v. Minister of Pensions and National Insurance,* [1967] IQ B; *Simmons v. Health Laundry Company* [1910] IK B 543 but the greater the skill required for an employee's works the less significant is control in determining whether the employee is under a contract of service: *Beloff v. Pressdram* [1973] 1 All ER 241. The more unskilled and untrained a person is, the less likely it will be that the employment tribunal will hold that he is running his own

business. In *Airfix Footwear Ltd v. Cope* [1978] ICR 1210, the applicant was a home-maker making heels for shoes manufactured by the respondent company. She was provided with the necessary equipment and material, and worked in accordance with instructions given to her. The Employment Appeal Tribunal upheld a finding that she was an employee. On the other hand in *Argent v. Minister of Social Security* [1968] 1 WLR 1749, an actor taught drama on a part time basis at a school. It was held that he was a self employed lecturer. These cases illustrate that the exercise of control or what is called the control test, is not conclusive.

[37] In *Stevenson, Jordan & Harrison Ltd v. Mac Donald & Evans* [1952] 1 TLR 101 Lord Denning propounded the organizational test wherein he said that "under a contract of service a man is employed as part of the business and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it". In *Bank voor Handel en Scheepvaart NV v. Slatford* [1953] 1 QB 248, Denning LJ at p. 295 echoed a similar test:

> The test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation.

[38] It was applied in *Whittaker v. Minister of Pensions and National Insurance*. In that case a trapeze artiste broke her wrists as a result of a fall in her act. It was held that she was an integral part of the circus business and thus an employee for the purpose of claiming industrial injuries benefits.

[39] Today, the problems are too complex to be capable of being resolved by the application of any single simple test and the courts, in meeting the challenges had, in appropriate cases, adopted what is known as the multiple test. In *Montreal v. Montreal Locomotive Works Ltd* [1947] 1 DLR 161 Lord Wright at p. 169 said:

> In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortuous liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the

charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

[40] In *Ready-mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497 the court adopted a similar approach when it had to examine the terms of the contract to see whether it was a contract of service or a contract for services. In that case, the appellant company entered into a contract with L in which the latter agreed to carry concrete for the former under a scheme of delivery by owner-drivers. In consideration thereof, L would be paid for his services at an agreed rate based on mileage. L was obliged to wear the appellant's uniform, place his lorry at the appellant's disposal throughout the contract, obey the orders of the foreman and to comply with all the appellant's rules, regulations or requirements. On the other hand, L had to maintain his lorry at his own expense, pay all the running costs, employ competent driver of his own choice whenever he was for any reason unable to drive, and maintain his own accounts. Mac Kenna J, after taking into account the multitude of factors, held that L was independent contractor.

[41] More recently, another test called the entrepreneurial test has emerged and now appears to be the dominant test. Here the court looks at the problem from a self-employed person's point of view and ask the questions "Is he in business on his own?" Again, no exhaustive list of considerations can be formulated. Does he provide his own equipment? Hire his own helpers? Is there any degree of financial responsibility for investment or degree of risks? Is there any opportunity to profit from sound management? These matters were considered in *Market Investigations Ltd v. Minister of Social Security* [1969] 2 QB 173 where the appellant company employed women as interviewers on part time basis to do market research. They could work as they choose but according to a set of pattern. These women were employed to conduct several thousand interviews annually to provide information for the company's customers about the habits and opinions of members of general

public, retailers or other people in commerce, industry and professions. One of the interviewers was one Mrs Irving. She was not continuously engaged but was intermittently engaged under a series of contracts. She was given a copy of the company's "interviewers guide" which contain detailed examples of various type of surveys, methods of interviewing, recording of information etc. Her work would be checked by the area organiser. She was however free to work for other firms doing similar work during the same period provided that she completed the work within the deadline. The issue was whether she was engaged under a contract of service or a contract for services. The court after considering all the above factors, the degree of control by the company and the nature and terms of the contract, held that she was employed by the company under a series of contract of services and that she was not on business "in her own account". Cooke J, in that case said (p. 184):

> "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

[42] A similar test was applied in *Lee Ting Sang v. Chong Chi-Keung & Anor* [1990] 2 AC 376. The first respondent, a building subcontractor was, at the material time executing a subcontract on behalf of the second respondents who were the main contractors upon a site at the Shan King Estate in Hong Kong. The applicant, a mason, was working for the first respondent upon the subcontract. During the course of his work the applicant fell from a high stool and suffered injury. The question on appeal was whether the provisions of the Employees Compensation Ordinance entitled the applicant to be compensated for his injury by the respondents. The Ordinance was modelled upon the English Workmen's

Compensation Acts and provides for compensation to be payable to an employee in respect of an accident arising out of, and in the course of, his employment.

[43] The respondents resisted the applicant's claim for compensation upon the ground that he was not working for the first respondent as an employee but had been engaged to carry out the work as an independent contractor. The district judge held that the applicant was working as an independent contractor and dismissed his claim for compensation. The Court of Appeal dismissed the applicant's appeal. The applicant appealed to the Privy Council on the ground that he was at the material time working as an employee of the first respondent within the meaning of the Ordinance.

[44] Before the Privy Council, learned counsel for the applicant invited their Lordships to apply a purposive construction of the Ordinance which he submitted, was clearly intended to give a wide measure of protection to worker in the building and construction industry and to provide compensation for those who would not ordinarily be expected to have taken out their own insurance against the risk of accidental injury.

[45] The Privy Council allowed the appeal and held that the applicant was an employee. It declined the invitation to adopt a different approach to the construction of a contract of service in the Ordinance from those adopted in the English Workmen's Compensation Acts. Lord Griffiths at p. 382 said:

> What then is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases. Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J. in *Market Investigations Ltd. v. Minister of Social Security* [1969] 2 QB 173, 184-185;
>
> > "The fundamental test to be applied is this" "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down

A as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

C After adverting to the facts of the case, as summarized in the judgment of the Court of Appeal, Lord Griffith arrived at the following conclusion:

D Upon this findings of fact their Lordships would have had no hesitation, if sitting as a court of first instance, in concluding that the applicant was working for the first respondent as an employee and not as an independent contractor. All the tests, or perhaps it is better to call them indicia, mentioned by Cooke J in *Market Investigations Ltd. v. Minister of Social Security* [1969] 2 Q.B. 173, E 184-185, point towards the status of an employee rather than an independent contractor. The applicant did not provide his own equipment, the equipment was provided by his employer. He did not hire his own helpers; this emerged with clarity in his evidence when he explained that he gave priority to the first respondent's work and if asked by the first respondent to do an urgent job he F would tell those he was working for that they would have to employ someone else; if he was an independent contractor in business on his own account, one would expect that he would attempt to keep both contracts by hiring others to fulfil the contract he had to leave. He had no responsibility for investment in, or G management of, the work on the construction site, he simply turned up for work and chipped off concrete to the required depth upon the beams indicated to him on a plan by the first respondent. There is no suggestion in the evidence that he prices the job which is normally a feature of the business approach of a subcontractor; he was paid either a piece-work rate or a daily rate according to the H nature of the work he was doing. It is true that he was not supervised in his work, but this is not surprising, he was a skilled man and he had been told the beams upon which he was to work and the depth to which they were to be cut and his work was measured to see that he achieved that result. There was no question I of his being called upon to exercise any skill or judgment as to which beams required chipping or as to the depths. That they were

to be cut. He was simply told what to do and left to get on with it as, for example, would a skilled turner on a lathe who was required to cut a piece of metal to certain dimensions.

Taking all the foregoing considerations into account the picture emerges of a skilled artisan earning his living by working for more than one employer as an employee and not as a small businessman venturing into business on his own account as an independent contractor with all its attendant risks. The applicant ran no risk whatever save that of being unable to find employment which is, of course, a risk faced by casual employees who move from one job to another, and such casual employees are specifically covered by the Ordinance.

[46] The Privy Council also held that a finding by a county court judge that a workman was or was not employed under a contract of service was a question of fact which an appellate court could only interfere if there was no evidence to support his finding. Similarly, in our case the learned judge had made a finding of fact that the appellant was not an employee of the insured. It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the factual findings of the court below be disturbed by the appellate court unless it appears that those findings are clearly wrong: *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163, *Tan Sri Khoo Teck Puat & Anor v. Plentitude Holdings Sdn Bhd* [1993] 2 CLJ 146.

[47] A somewhat similar approach was adopted by our courts. Gill J (as he then was) in *Bata Shoe Company (Malaya) v. Employee Provident Fund Board* [1966] 1 LNS 18 explained the distinction between a contract of service and an independent contractor as follows:

A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope and the duty of the undertaking. Whether or not a particular contract is a contract of service is a question of fact, depending upon the terms of the engagement, the method of remuneration, and the power of controlling and dismissing the workmen, although none of these factors is by itself conclusive. (See *Halsbury*'s, 3rd. edition, volume 25, page 448, paragraph 872.)

In *Short v. J and W Henderson Ltd.* (1946) 174 LT 417, 427. Lord Thankerton recapitulated with approval the four indicia of a contract of service derived by Lord Justice Clerk in *Park v. Wilsons and Clyde Coal Co Ltd* [1928] SC 121, 135 from the authorities

referred to by him. These are: (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the doing of the work; and (d) the master's right of suspension or dismissal. Lord Justice Clerk had gone on to say that a contract of service may still exist if some of these elements are absent altogether, or present only in an unusual form, and that the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship.

It is to be observed that the relationship of master and servant is characterized by a contract of service, express or implied, between the master and the servant. A contract of service is to be distinguished from a contract for services because a person who contracts to provide services for another person is not a servant but an independent contractor. To distinguish between an independent contractor and a servant, the generally accepted test is whether the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work. In *Stevenson Jordan & Harrison Ltd v. MacDonald & Evans* [1952] 1 TLR 101, 111 Lord Justice Denning said:

> One feature which seems to run through the instance is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

[48] Now apply the above tests to the facts in our case. The answer would be very obvious. It was a one-off engagement. The insured had no control over the appellant in her work as a beautician. She would in performing her work to dress, make up and beautify the bride be using her own skill and judgment. She provided her own equipment and for her services she would be paid RM100. All these factors lead to an irresistible conclusion that she was engaged by the insured to perform those services as "a person in business on her own account". Apart from these, there was the unqualified admission by the appellant herself that the insured was not her employer, a fact which was affirmed by the insured who also testified for the appellant. As such, I am left with no doubt that the appellant was travelling in the car as an independent contractor and not by reason of or in pursuance of a contract of employment or service.

[49] *Richards v. Cox* which was cited by the appellant was not a case which directly turned on the construction of the words "arising out of and in the course of" employment of the employer. There, the passenger (Miss Richards) suffered injuries while travelling in her employer's car in the course of her employment. The car was driven by a co-employee (Robson). The question was from whom she could recover damages due to the negligent driving of the driver. The proviso to s. 11 of the insurance policy states that the insured ie, the employer shall not be liable in respect of bodily injury to any person in the employment of the insured. She sought legal advice from Cox, the solicitor, but was advised by the solicitor's clerk that she could not recover damages from her employer (Dickersons). Later she sought an independent advice and was told that she could and ought to have sued the driver as the insurance company would under the terms of the insurance policy be bound to indemnify the driver. That was because the exception that the employer shall not be liable in respect of bodily injury to any person in the course of employment did not extend to the driver since the passenger was not employed by the driver.

[50] This is what Mac Kinnon LJ at p. 628 said:

> When you are considering Robson's rights to recover under the policy, he is to be treated as though he were the insured and he is subject to the terms and conditions of the policy, and claim made by him in respect of liability to pay damages to Miss Richards would only be barred under that clause if Miss Richards was in the employment of Robson. The fact that she was in the employment of Dickersons, who are not making the claim, is quite irrelevant and immaterial.

[51] The issue in *Union Insurance Malaysia Sdn Bhd v. Chan You Young* is also different. In that case the respondent suffered injuries whilst travelling in a motorcar belonging to her husband and driven by her son, on her way to work for her employer. She successfully sued both of them but the insurer of the said motorcar refused to satisfy the judgment. The court therefore had to decide whether the exception to s. 11 of the insurance policy, namely, that the insurer would not be liable to any member of the insured's household unless such person is being carried by reason of or in pursuance of a contract of employment, exempted the insurer from satisfying the judgment. The High Court held that the insurer was liable as the respondent was not a member of her son's household and that she

was in the car by reason of her contract of employment with her employer, a third party. In our case the learned judge had found as a fact that there was no contract of employment between the appellant and the insured. It is a also a fact that there did not exist any contract of employment between the appellant and any third party.

[52] In my judgment, the learned judge had not misdirected himself in law or in fact. His lordship had duly considered the appellant's case and had extensively dealt with the law on these issues. In arriving at his decision it was indeed necessary for the learned judge to consider the distinction between a contract of service and a contract for services as the agreed issues for the decision of the court revolved on the question whether the appellant was travelling as a mere passenger or by reason of or in pursuance of a contract of employment. He had, to my mind came to a correct conclusion when he held that the respondent was not liable to satisfy the judgment of the High Court dated 19 May 1997. In the result the appeal ought to be dismissed with costs and that the deposit be paid to the respondent on account of taxed costs.

[53] My learned sister Zaleha Zahari had seen this judgment in draft and expressed her agreement with it.

Abdul Malik Ishak JCA:

The Background Facts

[54] On 24 July 1985 - more than 23 years 9 months ago (achieved by calculating backwards from 24 April 2009 being the date of this judgment), the plaintiff, a beautician living in Seremban, was engaged by Angel Helen Puspam Pereira ("Angel") to dress, make-up and beautify her brother's prospective bride for a wedding that would be taking place in a church at Kluang, Johore. There were two agreed terms of the engagement. Firstly, that the plaintiff would be paid RM100 by Angel. Secondly, that transport would be provided by Angel to the plaintiff to enable the plaintiff to travel from her home in Seremban to Kluang, Johore and back.

[55] Angel owned a motor car bearing registration number BBU 8691 and that motor car was insured with the defendant - South East Asia Insurance Berhad. The insurance policy between the insured - Angel, and the insurer - defendant, was in place. It was

essentially a contract between the insured and the insurer. A notable feature of an insurance contract is this. That the contract is made with reference to the occurrence of a specified event, which occurrence is rather uncertain. So the insured insures against the occurrence of a specified event. In the words of Megarry VC in the case of *Medical Defence Union Ltd v. Department of Trade* [1980] 1 Ch 82, at pp. 89 to 90 of the report:

> First, the contract must provide that the assured will become entitled to something on the occurrence of some event. ... Second, the event must be one which involves some element of uncertainty. ... . Third, the assured must have an insurable interest in the subject matter of the contract.

[56] Now, Angel's brother by the name of Edwin Nobel Pereira drove Angel's motor car and collected the plaintiff at Seremban. That was on 24 July 1985. He drove the motor car with the plaintiff as a passenger from Seremban to Kluang so that the plaintiff, who was employed by Angel, could attend to the prospective bride. Whilst being driven by Angel's brother, the authorised driver, the motor car skidded and overturned and the plaintiff was seriously injured. It was rather unfortunate that the plaintiff became paralysed neck downwards. She attended the appeal and we saw that she was on a wheelchair.

[57] The plaintiff gave the requisite notice dated 19 October 1990 to the insurer defendant South East Asia Insurance Berhad pursuant to s. 96(2) of the Road Transport Act 1987 (Act 333) and the plaintiff then brought an action against Angel as the registered owner of the motor car BBU 8691 and against Edwin Nobel Pereira as the authorised driver at the Muar High Court vide civil suit number 23(25)-15 of 1990. The insurer South East Asia Insurance Berhad was in full control when the trial proceeded and that control was exercised through their solicitors Messrs L Pereira & Associates who acted on behalf of both Angel and Angel's brother.

[58] The Muar High Court heard the case till completion. It was a full hearing. At the end of the trial, the Muar High Court found that both Angel and her brother liable and made an award as per the court order dated 19 May 1987 (see pp. 176 to 179 of the appeal record).

[59] In short, judgment in favour of the plaintiff was given by the Muar High Court against the owner (Angel) and the authorised driver (Angel's brother) and this very judgment was subsequently confirmed by the Court of Appeal.

[60] It was rather unfortunate that South East Asia Insurance Berhad refused to pay the damages and costs awarded by the Muar High Court in civil suit number 23(25)-15 of 1990 on the ground that the insurance policy taken by Angel did not cover passenger liability. This prompted the plaintiff to file a recovery action against South East Asia Insurance Berhad in the Muar High Court *vide* civil suit no: 23-62-1999 (hereinafter referred to as the "recovery action").

[61] The Muar High Court dismissed with costs the recovery action by the plaintiff against South East Asia Insurance Berhad. Aggrieved by that decision, the plaintiff now appeals to this court.

Analysis

[62] The insurer South East Asia Insurance Berhad admitted that there was a valid policy fulfilling the requirements of s. 75(1)(b)(ii) of the Road Traffic Ordinance 1958 which is in *pari materia* with the present s. 91 of the Road Transport Act 1987 (Act 333). In essence, s. 75(1)(b)(ii) of the Road Traffic Ordinance 1958 states that the insurers are liable under their policy when passengers suffer bodily injury whilst being "carried by reason of or in pursuance of a contract of employment."

[63] The insurer South East Asia Insurance Berhad argued that when the injury took place the plaintiff was not being carried in Angel's motor car by "reason of or in pursuance of a contract of employment." It was also argued that the plaintiff's engagement as a beautician by Angel did not create an employer employee relationship and for that reason the insurer South East Asia Insurance Berhad cannot be held liable under s. 75(1)(b)(ii) of the Road Traffic Ordinance 1958 to settle the judgment obtained by the plaintiff against the owner of the motor car (Angel) and the authorised driver (Angel's brother).

[64] An employer is always liable in tort and such liability can safely be divided into two categories. The first relates to the primary liability. In this context, in the area of negligence the general duty of an employer is to take reasonable care for the health and safety

of his workers. In the past, this duty of care is always owed to employees and not to workers but this categorisation is becoming less rigid. The second relates to vicarious liability which essentially means that an employer is liable for the torts of his employees committed in the course of their employment.

[65] As a general rule, only employees are owed the primary duties and it is only for their torts that an employer is vicariously liable. But this general rule has become anomalous because of the changes to the labour market. Thus, we now have in our midst - the self-employed, part-timers, and trainees. We have beauticians ("mak andams" in the Malay language) just like the plaintiff here, the satay sellers, the mee-rebus sellers, the nasi-briyani gam sellers, the burger sellers and the ice-kacang sellers - to name a few of them. These self-employed would cater to the needs of individuals who are preparing for their wedding receptions in their respective houses. In my judgment, it seems strange, that these persons who are doing the same kind of work as employees should not be owed the same or similar duties by the employer. By the same token, it seems harsh to deny recovery against the insurer just because of the narrow view that one takes of vicarious liability. But in recent years, we have seen the trend of an extended scope of the primary liability where an employer is said to be liable to its employees for what are in effect the acts of an independent contractor. In this context, the case of *McDermid v. Nash Dredging & Reclamation Co Ltd* [1987] 1 AC 906, a decision of the House of Lords, should be referred to. The facts in that case may be stated as follows. The plaintiff was employed by the defendants as a deckhand. In the course of his employment he worked on board a tug owned by a Dutch company and under the control of a Dutch captain employed by them. The plaintiff's work included untying ropes mooring the tug fore and aft to a dredger. The system used by the captain was that when the plaintiff untied the ropes and it was safe for the captain to move the tug the plaintiff would give a double knock with his hand on the wheelhouse. At the time in question the plaintiff had untied the aft rope but was still in the course of untying the forward rope when the captain, without waiting for the plaintiff's signal, put the engine of the tug hard astern. As a result, the rope snaked round the plaintiff's leg, causing him serious injury. On his claim against the defendants for damages for, *inter alia*, negligence, Staughton J, held that his injuries had been caused by the captain's negligence, that the captain was to be deemed to have acted as the defendants'

employee and that, therefore, the defendants were vicariously liable for his negligence to the plaintiff. He held, however, that the defendants were entitled to limit their liability by virtue of s. 503 of the Merchant Shipping Act 1894 as extended by s. 3 of the Merchant Shipping (Liability of Shipowners and Others) Act 1958 on the ground that the captain had been their servant within the meaning of s. 3(2)(a) of the Act of 1958. The Court of Appeal dismissed an appeal by the defendants on the question of liability and allowed a cross-appeal by the plaintiff on the limitation point. On appeal by the defendant, the House of Lords dismissed the appeal and held that the defendants owed the plaintiff a duty of care to devise a safe system of work for him and to see that that system was operational; that assuming that the captain's system of waiting for a double knock on the wheelhouse before putting the tug in motion could be called a safe system it had not been operated at the time of the plaintiff's accident and the captain's negligence in not operating it had not been casual or collateral but had been central to the operation of the system; that the defendants' duty of care was non-delegable in the sense that they were personally liable for its performance and could not escape their liability if it was delegated and not properly performed; and that, accordingly, although they had delegated the performance of their duty of care to the captain, they could not thereby avoid their own liability to the plaintiff.

[66] As demonstrated, the law is increasingly recognising duties of care owed to those subject to another's control, irrespective of whether they are its employees or not. In my judgment, I say that vicarious liability is a flexible doctrine. It has been extended to apply to those whom an employer or other user exercises some control even though strictly they are not its employees.

[67] One may ask the pertinent question: who is an employee? In reply, I would say that an employee is someone who works under a contract of service. Whereas an independent contractor works under a contract for service. It must be emphasised that this categorisation is relevant but it is not decisive (*Young & Woods Ltd v. West* [1980] IRLR 201, CA). The better test would be based on the factual relationship between the parties. Some years ago, the courts tended to focus on the ability of an employer to tell a worker what and how to do his or her job, strongly influenced by the term "servant" as reflected in *Yewens v. Noakes* [1880-81] 6 QBD 530, CA. But as the years go by and with the growing sophistication of the labour

force compounded with the emergence of highly skilled workers, that test as I mentioned earlier seemed to elude many workers who seemed, apart from the legal niceties, to be nothing more than mere employees. The test was also inconsistent with the desire to expand and enlarge the scope of liability. In *Cassidy v. Ministry of Health* [1951] 2 KB 343, the court expanded that scope when a surgeon was held to be an employee despite the lack of any real control over how he worked. And this decision certainly ensure, in future, recovery to those injured through medical negligence.

[68] The courts have moved ahead in tandem with the development in the country. The employment relationship of the labour force has changed its landscape with the courts giving weight to many factors which are incapable of being exhaustively listed and none of which is decisive. Cooke J, for instance, in *Market Investigations Ltd v. Minister of Social Security* [1969] 2 QB 173, at pp. 184 to 185 put it rather nicely in this way:

> ... the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment of management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

[69] The above passage was vigorously applied in *Lee Ting Sang v. Chung Chi-Keung And Another* [1990] ICR 409, PC where a casual building worker was held to be an employee.

[70] Joinery workers paid on daily basis were held to be employees in *United Wholesale Grocers Ltd v. Sher* [1993] SLT 284.

[71] Homeworkers who were regularly given and accepted work were held to be employees in *Nethermere (St Neots) Ltd v. Gardiner And Another* [1984] ICR 612, CA.

[72] In *Lane v. Shire Roofing Co (Oxford) Ltd* [1995] IRLR 493, the Court of Appeal was of the view that in the context of safety at work, there was a real public interest in recognising the employer/employee relationship. And according to Henry LJ, the court should ask itself whether the worker was subject to control or, in the case of a skilled worker, whose business it was, these questions should be addressed in the context of who was responsible for the overall safety of the work, which was a question of law.

[73] *Lane*'s case is certainly a welcome approach. It leans towards finding someone to be an employee.

[74] However, in *McMeechan v. Secretary of State for Employment* [1995] ICR 444, the court held that the issue of the legal status of the worker was a "question of law to be determined on the true construction of all the terms and conditions of the contract in its factual matrix."

[75] The purpose of establishing vicarious liability is this. It is to show whether the employer is liable for the torts of his employees committed in the course of employment.

[76] In *Market Investigations v. Minister of Social Security (supra)*, the court was faced with a question of whether Mrs Irving was an employed person for the purposes of social security legislation. She was engaged as an interviewer by a company involved in market research and was free to work when she wanted. It was held that Mrs. Irving was an employee.

[77] In *Performing Right Society, Limited v. Mitchell and Booker (Palais De Danse), Limited* [1924] 1 KB 762, the defendants engaged a band called "Original Lyrical Five" to play at their dance hall, and the band played two songs without the permission of the claimants, the owners of the copyright. It was held that the members of the band were employees of the defendants who were liable for the breach of copyright.

[78] The older cases do not use labels like "employer employee". Rather, words like "master" and "servant" would be used instead of "employer" and "employee". In ascertaining the master servant

relationship, one must look at the nature of the task undertaken as well as the freedom of the action given together with the quantum of the contract sum. One must also look at the manner in which the contract sum is to be paid coupled with the power of dismissal as well as the circumstances when payment of the contract sum would be withheld. In short, it is the nature and the degree of detailed control which the master has over the servant. Here, the plaintiff was nothing more than a mere servant who would be under the control of Angel. How the plaintiff would make-up and beautify the prospective bride would be determined by Angel. How the "mascara" has to be applied, the right make-up for the prospective bride, the way the hair of the prospective bride would be done up together with the type of jewellery that has to be worn are all determined by Angel - the master. And the plaintiff as the servant has no choice but to comply. That would precisely be the scope of work of the plaintiff which is akin to the work of the "mak andam".

[79] It is germane, at this juncture, to refer to Sir Frederick Pollock, *The Law of Torts*, 13th edn, 1929 publication, at pp. 82 to 83. There the following passages appeared:

> The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, 'retains the power of controlling the work': see per Crompton J., in *Sadler v. Henlock*, [1855] 4 E & B 570, 578, a servant is a person subject to the command of his master as to the manner in which he shall do his work: see per Bramwell LJ in *Yewens v. Noakes* [1880] 6 QBD 532; and the master is liable for his acts, neglects, and defaults, to the extent to be specified. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand.

[80] But, sometimes, the doctrine of vicarious liability gives rise to an absurd result as exemplified in the case of *O'Kelly And Others v. Trusthouse Forte PLC* [1983] ICR 728. That was a case where the applicants were casual wine waiters who worked when required, but it was held for the purposes of the employment law that they were not "employees" because there was no "mutuality of obligation" in that even if they were asked to work they were not required to do so.

[81] I wonder if the casual wine waiters, while working, spilt wine over a few customers, should the hotel owner be vicariously liable? It cannot be argued that the casual wine waiters were in the business on their own account. They were in fact temporarily under the control of the hotel managers and consequently were an essential part of the organisation. I would say that whatever technical status these casual wine waiters may acquire in employment, it cannot be denied that common sense and the justice of the matter dictate that the hotel should be vicariously liable for their activities while they are actively working in the hotel.

[82] Another interesting case would be that of *Mersey Docks And Harbour Board v. Coggins & Griffiths (Liverpool) Ltd. And McFarlane* [1947] AC 1, [1946] 2 All ER 345, 351. In that case the Harbour Board hired out a mobile crane, together with a driver, Mr. Newall, to the defendant stevedores. Mr. Newall was paid and liable to be dismissed by the Harbour Board, but the contract of hire stated that he was to be regarded as the employee of the stevedores. The stevedores could tell him what to do, but not how he was to operate the crane. Mr. Newall negligently injured a Mr. Mac Farlane. It was held, on the question whether the Harbour Board or the stevedores were to be held vicariously liable for the negligence of Mr. Newall, that the Harbour Board was liable. The appeal was then dismissed.

[83] The judgment of Lord Porter in *Mersey Docks And Harbour Board v. Coggins & Griffiths (Liverpool) Ltd And McFarlane (supra)* was quite interesting. There his Lordship had this to say:

> Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed - all these questions have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion, but among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this, he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders, were given, but who is entitled to give the orders as to how the

> work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping. In the present case, if the appellants' contention were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship. Indeed, he might change it from day to day, without any say as to who his master should be and with all the concomitant disadvantages of uncertainty as to who should be responsible for his insurance in respect of health unemployment and accident.
>
> I cannot think that such a conclusion is to be drawn from the facts established.

[84] *Mersey Docks And Harbour Board v. Coggins & Griffiths (Liverpool) Ltd. And McFarlane (supra)* illustrates the difficulty with the control test. There was evidence that Mr. Newall had said, "I take no orders from anybody." But Lord Parker, writing a separate judgment, pointed out that this "sturdy reply" meant that he was a skilled man, but nevertheless the Harbour Board had the power to give him directions as to how he should carry out the work, and could dismiss him if he refused to carry them out.

[85] John G Fleming, *The Law of Torts*, at pp. 354 to 355, 1957 publication contains this very interesting passage:

> Despite the frequent invocation of such meaningless phrases as respondeat superior or *qui facit per alium*, *facit per se*, the modern doctrine of vicarious liability cannot be regarded as a deduction from legalistic premises, but should be frankly recognised as having its basis in a combination of policy considerations. Most important of these is the feeling that a person who employs others to advance his own economic interests should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise, that the master is better able to compensate the accident victim than the less pecunious employee, and that the rule advances the policy of wide distribution of tort losses among that section of the public which benefits from the enterprise, the employer being the most suitable channel for passing on the loss through liability insurance and higher prices. The principle gains additional support for its admonitory value in accident prevention. In the first place, deterrent pressures are most effectively brought to bear on larger units like employers who are in a strategic position to reduce accidents by efficient organisation and supervision of their staff. Secondly, the fact that employees are, as a rule, not worth suing because they are rarely financially responsible, removes from them

A the spectre of tort liability as a discouragement of wrongful conduct. By holding the master liable, the law furnishes an incentive to discipline servants guilty of such lapses, if necessary by insisting on an indemnity or contribution.

B **[86]** It would be ideal to summarise and identify what Fleming, in that book, said:

(a) Firstly, the vicarious liability doctrine allows the plaintiff to obtain compensation from an insurer who is financially capable of satisfying a judgment.

C

(b) Secondly, a person which would also include a corporation, who employs others to advance its own economic interest should in fairness be placed in a corresponding liability for losses incurred in the course of the business which losses must be incurred by the insurers.

D

(c) Thirdly, the vicarious liability doctrine promotes a wide distribution of tort losses because the employer is the most suitable conduit for passing them on through liability insurance.

E (d) Fourthly, from the prospective of deterrence the vicarious liability doctrine is a good doctrine.

[87] In *Kooragang Investments Pty Ltd v. Richardson & Wrench Ltd* [1981] 3 All ER 65, Privy Council, Lord Wilberforce said at p. 68 F that the manner in which the common law has dealt with the liability of employers for acts of employees (like masters for servants and principals for agents), has been progressive and that the tendency has been toward more liberal protection of innocent third parties.

G **[88]** It is quite obvious that it is always the plaintiff who would greatly benefit from the doctrine of vicarious liability because it allows access to the deep pocket of the insurance company even in a situation where the plaintiff is totally blameless like the present plaintiff in this appeal.

H

[89] Lord Denning puts it aptly in the case of *Morris v. Ford Motor Co Ltd, Cameron Industrial Services Ltd. (Third Party), Roberts (Fourth Party)* [1973] 1 QB 792, CA, at p. 798 when his Lordship said that the courts "would not find negligence so readily - or I award sums of such increasing magnitude - except on the footing that the damages are to be borne, not by the man himself, but by an insurance company" through coverage purchased by the

employer. Here, Angel took the insurance coverage for her motor car from the insurer South East Asia Insurance Berhad and the said motor car was driven by her brother, an authorised driver, and the plaintiff took the necessary precaution of giving the requisite notice dated 19 October 1990 to the insurer South East Asia Insurance Berhad pursuant to s. 96(2) of the Road Transport Act 1987 (Act 333), and the unfortunate road accident happened when the plaintiff was a passenger in the motor car as a "servant" or "employee" of Angel, and consequently, in the recovery action against the insurer South East Asia Insurance Berhad, the plaintiff should succeed. There are no two ways about it.

[90] MacDonald J, in *Hamilton v. Farmers' Ltd* [1953] 3 DLR 382 (NSSC), observed that the principle of vicarious liability "probably reflects a conclusion of public policy that the master should be liable for the incidental results of the conduct of his business by means of his servants as a means of distributing the social loss arising from the conduct of his enterprises."

[91] In my judgment, the vicarious liability principle or doctrine is a mechanism by which the employer guarantees the employee's primary liability by taking an insurance coverage. It has the broader function of transferring to the insurance company like South East Asia Insurance Berhad the risks created by the activity performed or undertaken by the employer's employee or by the master's servant.

[92] I will now refer to the insurance coverage taken by Angel. At p. 132 of the appeal record, s. 11 thereto reads as follows:

Section 11 - Liability To Third Parties

1. The Company will subject to the Limits of Liability indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of

   (a) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the Insured, and excluding liability to any person being a member of the Insured's household who is a passenger in the Motor Vehicle unless such person is being carried by reason of or in pursuance of a contract of employment.

[93] The root words to s. 11 as reproduced above contain two parts. The first part would be the words "arises out of and in the course of employment." The second part can be found in the words "by reason of or in pursuance of a contract of employment."

[94] I have discussed quite extensively about the second part and I will now say something about the first part.

[95] It is said that an employer is liable for the torts of his employee only if the act "arises out of and in the course of employment." A classic case to refer to would be the case of *Staton v. National Coal Board* [1957] 1 WLR 893. That was a case where one of the National Coal Board's employees, having finished his week's work, was riding his bicycle across the board's premises in order to collect his wages from a part of those premises different from the part on which he worked. While he was bicycling there, he knocked over and killed another employee of the National Coal Board. The question that arose for determination was whether the National Coal Board was liable vicariously for the negligence of the cyclist employee. It was contended on behalf of the National Coal Board that they were not liable because the course of that employee's employment had ceased when he had finished work. The fact that he the cyclist was merely going to collect his wages was neither here nor there and that did not, so it was argued, kept the chain of the course of employment in existence. The plaintiff argued by posing this question, what could be more part of a course of a person's employment than collecting his wages? It was emphasised that the employee was still on the National Coal Board's premises. That the cyclist was merely going to collect his wages from a place which was also located on the Board's premises. And so, for these reasons, it was argued that the cyclist was still in the course of his employment and that the course of his employment had not ceased. In a rather long judgment, Finnemore J, considered all the cases to which he had been referred to and he came to the conclusion that the course of employment had not ceased and that the chain had not been broken. Accordingly, his Lordship held that National Coal Board was vicariously liable for the negligent act of the cyclist.

[96] *Jefferson And Others v. Derbyshire Farmers, Limited* [1921] 2 KB 281, CA, is yet another interesting case to refer to. There, Charles Booth, aged 16, was directed by his employer to fill some tins with petrol from a drum. He did as he was told by turning on

the tap on the drum and, at the same time, he lit a cigarette and threw the match on the floor. What happened thereafter was catastrophic. The garage he was working, which was owned by the claimant, was entirely destroyed. It was held, dismissing the appeal that the employers were vicariously liable. In his judgment, Warrington LJ, had this to say at p. 288:

> There is no doubt or question that the fire was caused by the negligent act of Booth. It would have been a negligent act to smoke at all in the immediate neighbourhood of the spirit. Still more was it a negligent act to light a match while the spirit was flowing from the drum. Horridge J, decided in favour of the defendants on this point on the ground that what the boy did in lighting and throwing away the match was not in the scope of his employment. In one sense it was not; he was not employed to light the match and throw it away; but that is not the way in which to approach the question. It was in the scope of his employment to fill the tin with motor spirit from the drum. That work required special precautions. The act which caused the damage was an act done while he was engaged in this dangerous operation, and it was an improper act in the circumstances. That is to say, the boy was doing the work of his employers in an improper way and without taking reasonable precautions; and in that case the employers are liable.

[97] The case of *Harrison v. Michelin Tyre Co Ltd* [1985] ICR 695, once again, shows the might of the doctrine of vicarious liability. There, Mr Smith in the proper course of his employment was wheeling a hand truck along a passageway when he deliberately, as a matter of ordinary horseplay, turned the truck a couple of inches and pushed the edge of it under a duck board on which the claimant was standing. The claimant fell and was injured. It was held that the employer was vicariously liable.

[98] In *Petterson v. Royal Oak Hotel, Limited* [1948] NZLR 136, a barman refused to give a drink to a customer, who thereupon threw a glass at the barman. The barman picked up a piece of the broken glass and threw it at the customer, but a piece of the glass struck a bystander in the eye. It was held that the barman's employer was vicariously liable, as he was engaged in an improper mode of keeping order.

[99] Yet another case to refer to would be the case of *Rose v. Plenty And Another* [1976] 1 WLR 141, CA The facts in that case are quite simple and straightforward. Christopher Plenty was a milkman. At his depot was a notice stating that, "Children and

young persons must not in any circumstances be employed by you in the performance of your duties." Notwithstanding this prohibition, Christopher Plenty engaged Leslie Rose, aged 13, to help him on his rounds, and injured Leslie Rose by driving the milk float negligently. It was held, allowing the appeal, that the employers were vicariously liable. Writing a separate judgment, Lord Denning MR had this to say at p. 143 to 144:

> This raises a nice point on the liability of a master for his servant. I will first take the notices to the roundsmen saying they must not take the boys on. Those do not necessarily exempt the employers from liability. The leading case is *Limpus v. London General Omnibus Co.* [1862] 1 H. & C. 526. The drivers of omnibuses were furnished with a card saying they 'must not on any account race with or obstruct another omnibus.' Nevertheless the driver of one of the defendants' omnibuses did obstruct a rival omnibus and caused an accident in which the plaintiff's horses were injured. Martin B. directed the jury that, if the defendants' driver did it for the purposes of his employer, the defendants were liable, but if it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible. The jury found for the plaintiff. The Court of Exchequer Chamber held that the direction was correct. It was a very strong court which included Willes J. and Blackburn J. Despite the prohibition, the employers were held liable because the injury resulted from an act done by the driver in the course of his service and for his masters' purposes. The decisive point was that it was not done by the servant for his own purposes, but for his masters' purposes.
>
> I will next take the point about a trespasser. The boy was a trespasser on the milk float so far as the employers were concerned. They had not given him any permission to be on the float and had expressly prohibited the milk roundsman from taking him on. There are two early cases where it was suggested that the employer of a driver is not liable to a person who is a trespasser on the vehicle. They are *Twine v. Bean's Express Ltd* [1946] 62 T.L.R. 458 and *Conway v. George Wimpey & Co. Ltd. (No. 2)* [1951] 2 K.B. 266. But these cases are to be explained on other grounds and the statements about a trespasser are no longer correct. Those statements were made at a time when it was commonly supposed that occupiers of premises were under no duty to use care in regard to a trespasser. But that stern rule has now been abandoned, especially when the trespasser is a child: see *Herrington v. British Railways Board* [1972] A.C. 877; *Southern Portland Cement Ltd. v. Cooper* [1974] A.C. 623 and *Harris v. Birkenhead Corporation* [1975]

1 W.L.R. 379. So far as vehicles are concerned, I venture to go back to my own judgment in *Young v. Edward Box & Co. Ltd.* [1951] 1 T.L.R. 789, 793, when I said:

> In every case where it is sought to make a master liable for the conduct of his servant the first question is to see whether the servant was liable. If the answer is Yes, the second question is to see whether the employer must shoulder the servant's liability.

That way of putting it is, I think, to be preferred to the way I put it later in *Jones v. Staveley Iron and Chemical Co. Ltd.* [1955] 1 Q.B. 474, 480.

Applying the first question in *Young v. Edward Box & Co. Ltd.*, it is quite clear that the driver, the milk roundsman, was liable to the boy for his negligent driving of the milk float. He actually invited the boy to ride on it. So the second question arises, whether his employers are liable for the driver's negligence. That does not depend on whether the boy was a trespasser. It depends, as I said in *Young v. Edward Box & Co. Ltd.*, on whether the driver, in taking the boy on the milk float, was acting in the course of his employment.

In considering whether a prohibited act was within the course of the employment, it depends very much on the purpose for which it is done. If it is done for his employers' business, it is usually done in the course of his employment, even though it is a prohibited act. That is clear from *Limpus v. London General Omnibus Co.* [1862] 1 H. & C. 526; *Young v. Edward Box & Co. Ltd.* [1951] 1 T.L.R. 789; and *Ilkiw v. Samuels* [1963] 1 W.L.R. 991. But if it is done for some purpose other than his masters' business, as, for instance, giving a lift to a hitchhiker, such an act, if prohibited, may not be within the course of his employment. Both *Twine v. Bean's Express Ltd.* [1946] 62 T.L.R. 458 and *Conway v. George Wimpey & Co. Ltd. (No. 2)* [1951] 2 K.B. 266 are to be explained on their own facts as cases where a driver had given a lift to someone else, contrary to a prohibition and not for the purposes of the employers. *Iqbal v. London Transport Executive* [1973] 16 K.I.R. 329 seems to be out of line and should be regarded as decided on its own special circumstances. In the present case it seems to me that the course of the milk roundsman's employment was to distribute the milk, collect the money and to bring back the bottles to the van. He got or allowed this young boy to part of that business which was the employers' business. It seems to me that although prohibited, it was conduct which was within the course of the employment; and on this ground I think the judge was in error.

[100] Here, what Angel's brother did in transporting the plaintiff from Seremban to Kluang, Johore and back as agreed by Angel at a fee to enable the plaintiff to dress, make-up and beautify her brother's prospective bride for a wedding reception was not a prohibited act under s. 11 of the insurance coverage. It arose out of and in the course of the plaintiff's employment and the accident occurred by reason of or in pursuance of a contract of employment *albeit* oral in nature between Angel and the plaintiff. There was in existence between Angel and the plaintiff, an employer employee relationship or what is commonly known as a master servant relationship. The flexibility of the doctrine of vicarious liability must be construed in favour of the plaintiff. That being the case, South East Asia Insurance Berhad are liable to pay the plaintiff under the terms of the insurance coverage taken by Angel in order to satisfy the judgment sought by the plaintiff in the recovery action. In the circumstances, the plaintiff's appeal must succeed. That is my judgment and I so hold accordingly.

[101] With respect, the Muar High Court in the recovery action erred in fact and in law when it held that at the material time the plaintiff was not covered by an insurance policy provided by South East Asia Insurance Berhad and that the plaintiff was not carried in Angel's motor car (the insured vehicle) "by reason of or in pursuance of a contract of employment" as provided for in the insurance coverage as well as s. 91(1)(bb) of the Road Transport Act 1987 (Act 333). To confound the matter further, the Muar High Court in the recovery action erred in law and in fact in not appreciating the legal effect of the facts agreed upon between the plaintiff and the insurer South East Asia Insurance Berhad, namely:

(a) that Angel engaged the plaintiff for a sum of RM100 to make-up the bride of Angel's brother;

(b) it was agreed for this purpose that Angel would provide transport to the plaintiff to go to the bride's house in Kluang, Johore and then back to her home in Seremban; and

(c) that the plaintiff suffered injuries in the course of travelling to the bride's house in Angel's insured motor car.

[102] In my judgment, had the Muar High Court in the recovery action appreciated the agreed facts as alluded to above, the learned judge would have held that the plaintiff was legally being carried in Angel's insured motor car "by reason of or in pursuance of a contract of employment."

[103] A good point was taken by the learned counsel for the plaintiff in the memorandum of appeal about the contra proferentum rule in interpreting the insurance coverage between Angel and the insurer South East Asia Insurance Berhad and the need to construe the phrase "by reason of or in pursuance of a contract of employment" in favour of the plaintiff.

[104] The *maxim verba charfarum fortius accipiuntur contra proferentem* or what is commonly called the *contra proferentum* rule, is a rule which requires a written document especially when there is an ambiguity to read it against the party that drafted the written document and to construe it in favour of the other contracting party. Translated to the facts of the present appeal, South East Asia Insurance Berhad as the insurer as well as the party that draws up the insurance coverage should not be allowed to create an ambiguity for the purpose of giving itself an advantage pertaining to the insurance coverage at the expense of the plaintiff. In *Central Lorry Service Co Sdn Bhd v. The American Insurance Co* [1980] 1 LNS 175, Mohamed Azmi J (as he then was) aptly said:

> In construing insurance policies, the *contra proferentem* rule should apply if there is ambiguity or doubt as to the extent of the policy. Since the policy is prepared by the insurance company, the doubt and ambiguity should be construed in favour of the insured, ...

[105] Another case in point would be the case of *Houghton v. Trafalgar Insurance Co Ld* [1954] 1 QB 247, CA Briefly, the facts in that case were these. A car insurance policy excluded liability for damage "caused or arising whilst the car is conveying any load in excess of that for which it was constructed." At the time of an accident there were six people in a car with seating accommodation for five and the insurers denied liability claiming that this was a load in excess of that for which the car was constructed. It was held that the word "load" only covered cases where there was a specified weight which must not be exceeded, as in the case of lorries or vans. Romer LJ observed as follows at p. 250:

> I think that it would be most regrettable if a provision of this kind were held to have the force for which the defendants contend. It would be a serious thing for a motorist involved in a collision if he were told that the particular circumstances of the accident excluded him from the benefit of the policy. I think that any clause or provision that purports to have that effect ought to be clear and

A unambiguous so that the motorist knows exactly where he stands. This provision is neither clear nor unambiguous. If applied to a private motor car I have not the least idea what it means.

[106] Romer LJ seems to suggest that policy reasons may have caused the Court of Appeal to reject the insurers' suggested B interpretation since it would have had a devastating effect on the ability of innocent third parties to recover on car insurance policies in those circumstances.

[107] Likewise here, to construe the insurance coverage as C suggested by the insurer South East Asia Insurance Berhad would have devastating effect on innocent individual like the plaintiff.

[108] Yet another case would be *Alex Kay Pty. Limited v. General Motors Acceptance Corporation and Hartford Fire Insurance Company* D [1963] VR 458. That was a case where the plaintiff company hired motor cars to the public. Its insurance policy with the second defendant contained a clause exempting the insurers from any liability for loss or damage arising from "any breach of contract, agreement or obligation." The plaintiff hired a Holden car to a Mr E Houmatsio who then vanished without a trace. The plaintiff claimed under the policy but the second defendant refused to pay. The refusal turned upon the meaning of the words "any breach of contract, agreement or obligation." The insurance company's reasoning was that the loss was caused by Houmatsio's breach of F contract and thus the loss excluded by the clause. Kay's argument was that the clause in the policy was not designed or intended to cover breaches by third parties and that Houmatsio's breach of contract did not affect Hartford's liability. It was held that the words used in the clause were ambiguous and were capable of at least G three meanings:

(a) any breach by the plaintiff of a contract made with the hirer;

(b) any breach of the contract of hiring by the hirer; or

H (c) any breach of the contract whatsoever.

Sholl J, held that the first of these meanings had to be adopted because it was the one least favourable to the second defendant. All ambiguities are construed against the person who inserts the clause I and as the clause had been inserted by Hartford, the meaning least helpful to them was the one to be preferred.

[109] Likewise here, all the ambiguities in the insurance coverage must be construed against the insurer South East Asia Insurance Berhad.

[110] Now, in order to succeed in this appeal, the plaintiff has to prove that at the material time when the motor car was driven by Angel's brother - the authorised driver, the plaintiff was a passenger by reason of or in pursuance of a contract of employment (s. 75(1)(b)(ii) of the Road Traffic Ordinance 1958; and *Manap Mat v. General Accident Fire & Life Assurance Corporation Ltd* [1971] 1 LNS 76). The decision of Tan Ah Tah J, in *Chan Kum Fook & Ors v. Welfare Insurance Co Ltd* [1975] 1 LNS 6 strikes a similar chord to the present appeal. The decision of Tan Ah Tah J, would certainly be of assistance to the plaintiff. I can do no better than to produce his Lordship's judgment as seen at p. 185 thereto:

> In this case the first and second plaintiffs were employees of the Century Engineering Co. (hereinafter called 'the Company' as was done in the pleadings). The Company was the owner of a motor van No. SGB 2099 which was being driven by one Yong Chan Seng, a driver employed by the Company. The first and second plaintiffs were by reason of or in pursuance of a contract of employment with the Company travelling as passengers in the motor van which was being driven by Yong Chan Seng from the premises of the Company, which was their employer, to a worksite where they were to carry on work as employees of the Company. Owing to the negligence of Yong Chan Seng the motor van ran off the road and crashed into a tree resulting in the first and second plaintiffs sustaining bodily injuries. The third plaintiff who was the father of the second plaintiff was put to loss and expense.
>
> The three plaintiffs commenced two separate proceedings claiming damages against the owner of the motor van and Yong Chan Seng. The two actions were consolidated and eventually judgment for damages was obtained by all three plaintiffs against the owner of the motor van and Yong Chan Seng.
>
> The motor van was insured under a policy issued by the defendants and the present action has been brought by the three plaintiffs who are relying, inter alia, on section 4(3) and section 8(1) of the Motor Vehicles (Third-Party) Risks and Compensation) Act (hereinafter referred to as 'the Act').
>
> It is submitted by counsel for the defendants that because of the wording of exception (ii) to Section II of the policy the defendants are not liable to make any payment to the plaintiffs.

Exceptions (ii) and (iii) to Section II read as follows:

The Company shall not be liable in respect of

(i) …;

(ii) death of or bodily injury to any person in the employment of the Insured arising out of and in the course of such employment;

(iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises'.

The wording of these two exceptions is based on the first two provisos to section 4(1) of the Act.

In my opinion the effect of the words in brackets in exception (iii) is to make the defendants liable in respect of injuries sustained by the first and second plaintiffs who were passengers 'carried by reason of or in pursuance of a contract of employment.' In the case of *Izzard v. Universal Insurance Co. Ltd.* [1937] A.C. 773, Lord Wright said at page 779:

> It is clear that though passenger risk in the full sense of the term is excluded, a certain limited class of passenger risk is specifically covered - namely, that described in the words in brackets in (c) quoted above which is in the form of an exception, and thus constitutes a positive cover.

[111] Next, it would be the case of *Richards v. Cox* [1942] 2 All ER 624, and the headnotes at pp. 624 to 625 read as follows:

An employee was injured in a car owned by the insured, who were her employers, through the negligence of the driver, who was also in the employ of the insured and authorised to drive the car. Para. (1) of the insurance policy provided that the insurance company would indemnify the insured against liability in respect of bodily injury caused by the car to third parties, excepting persons employed by the insured. Para. (2) provided that the insurance company would treat as though he were the insured person any authorised driver of the car provided 'that such person shall as though he were the insured observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply.' It was contended that the proviso in para. (1), which

excluded employees of the insured, extended to the cover given by para. (2), and that no claim could be made by an authorised driver in the case of injury to a fellow employee:

> Held: the exception in para. (1) of persons employed by the insured when introduced into para. (2) operated to exclude persons employed by the authorised driver but not persons employed by the company or person taking out the policy. Upon the proper construction of the policy the liability of the driver in this case to the injured employee was covered by the insurance and the insurance company, if a claim had been made, would have been bound to indemnify him, although the person injured was also in the employment of the principal insured.

[112] It was rightly submitted that the words "by reason of or in pursuance of a contract of employment" that appeared in s. 11 of the insurance coverage do not require the plaintiff to prove that there was a strict employer employee relationship with Angel. These words, so it was argued, embraced a wider category of employees and not necessarily restricted to the strict requirement of an employer employee relationship. It was also submitted that the appropriate test would be whether the plaintiff as a passenger was being carried in Angel's motor car "for sufficient practical or business reasons" (*Vandyke v. Fender and Another (Sun Insurance Office Ltd, third party)* [1970] 2 All ER 335, CA; *Izzard v. Universal Insurance Company, Limited* [1937] AC 773, HL: and *Union Insurance Malaysia Sdn Bhd v. Chan You Young* [1995] 4 CLJ 92, HC).

[113] The words "by reason of or in pursuance of a contract of employment" must be read to mean that such a contract was the cause or one of the causes for the passenger to be carried. And factually speaking the cause for the plaintiff to be carried in Angel's motor car was because of her engagement as a beautician by Angel - the insured owner of the motor car (*Vandyke v. Fender and another (Sun Insurance Office Ltd, third party) (supra)*).

[114] And the word "employment" that appears in s. 11 of the insurance coverage must be given a wide meaning. It should not be restricted to an employment under a contract of service. It should extend to employment in "a dozen other ways" (per Mr Justice Branson in *Burton And Another v. Road Transport & General Insurance Company, Ltd* [1939] Lloyd's List Law Reports 253) bearing in mind that vicarious liability is a flexible doctrine.

[115] A purposive approach must be adopted in interpreting the provisions of the Road Traffic Ordinance 1958 because it was enacted to protect the interest of the public as well as innocent third parties - like the plaintiff in the present appeal (*Malaysian National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351, SC; *The People's Insurance Co (M) Sdn Bhd v. Syarikat Kenderaan Melayu Kelantan Bhd (No 2)* [2001] 1 CLJ 510; *Akberdin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia* [2002] 4 CLJ 689, CA.; *Union Insurance Malaysia Sdn Bhd v. Chan You Young* (HC) *(supra)*; *Union Insurance Malaysia Sdn Bhd v. Chan You Young* [1999] 3 CLJ 517, CA; and *The People's Insurance Company (Malaysia) Bhd v. Ting Tiew Kiong* [2007] 5 CLJ 225, CA).

[116] In my judgment, South East Asia Insurance Berhad as an insurer has a duty to satisfy a judgment against an insured like Angel. It is undeniable that once a third party has secured a judgment against a person insured by the policy, the insurer is under a statutory obligation to satisfy this judgment. And this is so notwithstanding the fact that the insurer may be entitled to avoid or cancel the policy or may have avoided or cancelled the policy. Section 96(1) of the Road Transport Act 1987 (Act 333) enacts as follows:

> Duty of insurers to satisfy judgements against persons insured in respect of third party risks
>
> 96. (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

[117] Now, before the insurer's liability is complete, several conditions must be satisfied. Firstly, there must have been a judgment against a person insured by the policy. Here, a judgment has been obtained against Angel - the insured. Secondly, the judgment must be in respect of a liability which is required to be

covered by compulsory insurance. Here, at the time of the road accident Angel's motor car was covered by an insurance policy taken from South East Asia Insurance Berhad. Here, we are not concerned with a judgment obtained in respect of property damage (*QBE Insurance Ltd v. Dr K Thuraisingam* [1982] CLJ 260; [1982] CLJ (Rep) 705; and *Pacific & Orient Insurance Co Sdn Bhd v. Lee Yin Siong & Anor* [1983] 1 CLJ 91; [1983] CLJ (Rep) 690). Thirdly, the liability must be covered by the terms of the policy. Here, at the time of the accident, the liability of the authorised driver (Angel's brother) was covered by the insurance policy. Fourthly, a certificate of insurance had been issued to the insured. Here, such a certificate was issued to Angel. Fifthly, the insurer had notice of the proceedings by the third party against the insured. This brings into sharp focus s. 96(2) of the Road Transport Act 1987 (Act 333) which provides that no sum shall be payable by an insurer under s. 96(1) of the same Act unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings. But it does not state whether it is the insured or the third party who must give notice to the insurer. However, the case of *Wong Choo Yong v. Safety Insurance Co Ltd* [1970] 1 LNS 171 would be of some assistance. There the plaintiffs brought an action against the insurers to enforce a judgment which they had obtained against the insured by the name of Chin. The insurers contended that they had no notice of the proceedings. The plaintiffs had to adduce evidence to show that their solicitors had sent a letter to Chin, with a copy to the insurer, informing that legal proceedings would be taken in the High Court in Kuala Terengganu and that the solicitor had been instructed by them to file legal proceedings if payment was not received within ten days. In holding that the solicitor's letter was a sufficient notice of proceedings, his Lordship Ibrahim Manan J, referred to the Privy Council decision in *Ceylon Motor Insurance Association, Ltd v. Thambugala* [1953] 2 All ER 870, where in considering a similar provision, their Lordships of the Privy Council said (see p. 873):

> The notice which has been sent in this case sets out the name and address of the proposed plaintiff, the name of the owner and number of the car which caused injuries, the date of the accident, and the sum which was being claimed from the owner as damages. Their Lordships are of the opinion that these elements, taken

A together, constitute a sufficient notice of action under s. 134(a) and that there are no elements in it which in any way reduce it to something less than a sufficient notice.

[118] Here, as I said, the requisite notice was given by the plaintiff to the insurer South East Asia Insurance Berhad on 19 October 1990.

B

[119] The sixth condition would be that the execution of the judgment had not been stayed pending an appeal (see s. 96(2)(b) of the Road Transport Act 1987 (Act 333)). Here, there was no stay whatsoever.

C

[120] For the reasons adumbrated above, I allowed the plaintiff's appeal with costs. The deposit to be returned to the plaintiff appellant.

D

[121] As a matter of courtesy, I have shown this judgment to Zaleha Zahari, JCA and Abu Samah Nordin, JCA.

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